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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEAN PIERRE CASTELLANOS Defendant and Appellant.	G041065 (Super. Ct. No. 07HF0954) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton, and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

THE COURT:[*]

A jury convicted defendant of voluntary manslaughter, and further found it to be true that he personally used a deadly weapon. Defendant's conviction resulted after the jury found he stabbed the victim in a fight that occurred in the parking lot of a pool hall.

On appeal defendant argues his constitutional rights to due process and to a fair trial were violated after the court instructed the jury it could not consider defendant's voluntary intoxication in determining whether he acted with implied malice. Because the court's instruction to the jury mirrors Penal Code section 22, we affirm the judgment. [1]

I

Facts and Proceedings

In August 2007, defendant was charged with murder, along with an enhancement alleging he personally used a deadly weapon, a knife. In August of 2008, he was found guilty of voluntary manslaughter as a lesser included offense of murder, and the jury found it to be true that he personally used a deadly weapon. In September of 2008, the court sentenced him to a total term of 11 years in state prison.

Facts

In May of 2007, at about 8:30 p.m., defendant and two of his friends Patrick Yoon, and Daniel Pickard met at the Big Shots Bar and Grill, ("Big Shots)"a pool hall and restaurant located in Lake Forest, CA. The men played pool for over four hours, during which time defendant drank six rum and cokes.[2]

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* Before Sills, P.J., Rylaarsdam, and Ikola, J.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant testified in his own behalf. When asked by the prosecutor if he was "drunk" that evening, he responded that "I was feeling good. Just feeling the buzz." He was able to walk on his own, and was able to understand conversations he had with his friends.

Around 12:45 a.m., defendant and his friends left the pool hall, and were smoking and talking in the parking lot when Brian Davis and Andrea Connolly came out of Big Shots. They were both very drunk, and Connolly was riding on Davis's back. Davis and Connolly got into an argument with defendant and Pickard. Defendant began to yell racial slurs at Davis and Connolly, and asked them "do you want to fight?"

Yoon and Pickard grabbed defendant and forced him away. They told him to go home and forget about the argument, while at the same time pushing him inside of Pickard's car. Once defendant was in the car, Davis took off his shirt, ran up to Pickard's rear bumper and kicked it. Defendant became angry and got out of the car. Connolly told defendant that he "better get out of here before I get my boyfriend."

Timothy Jones, the victim, who was a friend of Davis and Connolly, ran up to defendant and hit him. Jones and defendant then got into a fist fight. At that point, the

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Pickard observed that although defendant's speech was "slurred" he did not appear to be impaired by the alcohol he had consumed that evening. The defense and prosecution stipulated that a rum and coke at Big Shots consisted of one shot of run (one and one-half ounces) and 12 ounces of coke.

Dr. Max Schneider, an addiction medicine specialist, and internist/gastroenterologist, testified pursuant to a defense hypothetical that the blood alcohol level of a person, defendant's size, or a 325 pound male who stood approximately 5 feet 11 inches, who started steadily drinking six rum and cokes between 8:45 p.m. and 12:15 a.m. would reach, and not exceed a blood alcohol level of .034. And, if the person was not slurring his speech and felt a "buzz," the person could "either be sober or not sober." The doctor further opined that if a person drinks steadily, and depending on how steadily, it would be less likely that the person would feel the effects of the alcohol. The defendant testified that he drank six rum and cokes through out the night "just pacing himself." The defendant testified he was feeling "happy" or "pretty good." He testified that while he was definitely feeling the drinks "a little bit," he did not have any problems walking or speaking.

Moreover, the People and the defense declined to argue defendant was intoxicated when he stabbed the victim.

bouncer from Big Shots ran out to the parking lot and told everyone the police were on their way.

Yoon and Pickard pulled defendant off Jones, while at the same time trying to physically restrain defendant. Connolly ran up and hit Pickard. At that point, defendant pulled out his pocket knife, opened it, and pointed it towards Jones. Someone called out "He's got a knife." Defendant then lowered the knife. Connolly ran up and hit defendant in the head. Defendant called her a "bitch" and a "slut." Jones lunged at defendant. Defendant swung several times at Jones. He stabbed Jones twice in the chest, once in the abdomen, and twice in the face. Jones stood back and said "you fucking stabbed me." Jones then collapsed and lost consciousness. One of the stab wounds penetrated his heart. He died from blood loss.

After stabbing Jones, defendant walked to the arcade next door to Big Shots. He tossed the knife on to the roof, but it slid down the slanted roof and onto the ground of the Big Shots parking lot. When defendant was placed in handcuffs, he told the police officer, "Sir, I didn't mean to stab him. He was attacking my friends."

Defendant testified in his own defense. He told the jury that he was afraid of Jones and Davis, who he thought were skin heads because they had tattoos, no shirts, and shaved heads. He took out his pocket knife during the fight because he believed that he and Pickard were in danger. He merely wanted to scare off Jones and Davis. Defendant claimed he was merely trying to push Jones away after Jones charged at him. Defendant told the jury he accidentally stabbed Jones.

II

Discussion

Defendant's Constitutional Rights to Due Process and a Fair Trial were not Violated by the Court's Instruction to the Jury that it May Not Consider Defendant's Voluntary Intoxication to Negate Implied Malice.

The essence of defendant's claim is not that the trial court mis-instructed the jury, but rather that section 22 upon which the given instruction is based, is unconstitutional. As numerous courts before us have concluded, section 22 is constitutional, and not violative of due process. Thus, defendant's argument fails.

Penal Code section 22

Section 22 was most recently amended in 1995. It provides: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. [¶] (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor. . . "

The 1995 amendment was promulgated in direct response to *People v. Whitfield* (1994) 7 Cal.4th 437, 451, where the California Supreme Court held that evidence of a defendant's voluntary intoxication was admissible to negate implied as well as express malice. However, in 1995, the Legislature distinctly inserted the word "express" before the word "malice" in subdivision (b).)

In addressing the history of the amendment to section 22, the court most recently in *People v. Turk* (2008) 164 Cal.kApp.4th 1361, 1374-1375, concluded "The

legislative history of the amendment unequivocally indicates that the Legislature intended to legislatively supersede *Whitfield,* and make voluntary intoxication inadmissible to negate implied malice in cases in which a defendant is charged with murder."

Or, as the court in *People v. Martin* (2000) 78 Cal.App.4th 1107,1115-1117, held, section 22 "is closely analogous to [the Legislature's] abrogation of the defense of diminished capacity . . . The 1995 amendment to section 22 results from a legislative determination that, for reasons of policy, evidence of voluntary intoxication to negate culpability shall be strictly limited. We find nothing in the enactment that deprives a defendant of the ability to present a defense or relieves the People of their burden to prove every element of the crime charged beyond a reasonable doubt."

More recently, the Legislative intent behind this section was again addressed in *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298, 1300, where the court explained that[3] "[s]ubdivision (b) of section 22 establishes, and limits the exculpatory effect of voluntary intoxication on the required mental state for a particular crime. It permits evidence of voluntary intoxication for limited exculpatory purposes on the issue of specific intent or, in murder cases, deliberation, premeditation and express malice aforethought. The absence of implied malice from the exceptions listed in subdivision (b) is itself a policy statement that murder under an implied malice theory comes within

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[3] The court in *People v. Timms, supra,* 151 Cal.App.4th 1292, at p. 1300, explained that section 22 did not violate a defendant's due process rights because section 22, subdivision (b) did not belong to "the prohibited category of evidentiary rules designed to exclude relevant exculpatory evidence." As the *Timms* court in quoting Justice Ginsburg's concurring opinion in *Montana v. Egelhoff* (1996) 518 U.S. 37, went on further to explain, "'Defining *mens rea* to eliminate the exculpatory value of voluntary intoxication does not offend a "fundamental principle of justice," given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today. [Citations.]' [Citation.] Under this rationale, [section 22] permissibly could preclude consideration of voluntary intoxication to negate implied malice and the notion of conscious disregard. Like the Montana statute [at issue in *Montana v. Egelhoff, supra,* 518 U.S. 37], the California Legislature could also exclude evidence of voluntary intoxication in determination of the requisite mental state." (*People v. Timms, supra,* 151 Cal.App.4th at p. 1300.)

the general rule of subdivision (a) such that voluntary intoxication can serve no defensive purpose. In other words, section 22, subdivision (b) is not 'merely an evidentiary prescription'; rather, it 'embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions.' [Citation.] In short, voluntary intoxication is irrelevant to proof of the mental state of implied malice or conscious disregard. Therefore, it does not lessen the prosecution's burden of proof or prevent a defendant from presenting all relevant evidence."[4]

Thus in sum, the law in California is clear. As the court in *Martin* so concluded, "Section 22 states the basic principle of law recognized in California that a criminal act is not rendered less criminal because it is committed by a person in a state of voluntary intoxication. Evidence of voluntary intoxication is not admissible to negate the capacity to form any mental states for the crimes charged [second degree murder, gross vehicular manslaughter while intoxicated and other related charges]. However, evidence of voluntary intoxication is admissible with respect to the actual formation of a required specific intent." (*People v. Martin, supra,* 78 Cal.App.4th at p. 1113.)

The trial court here followed the law when it instructed the jury.

The Court properly instructed the Jury with CALCRIM No. 625

The jury here was properly instructed with a modified version of CALCRIM No. 625[5] which defendant concedes, directly tracks section 22. This

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[4] Moreover, the court in *People v. Timms, supra* 151 Cal.App.4th 1292, 1301, also acknowledged the California Supreme Court's holding in *People v. Atkins* (2001) 25 Cal.4th 76, 93, wherein the constitutionality of section 22's limit on the use of voluntary intoxication evidence was upheld. The court in *Timms* stated, "[f]inally, we note that our Supreme Court has rejected, albeit cursorily, a due process challenge to section 22: '[W]e reject defendant's argument that the withholding of voluntary intoxication evidence to negate the mental state of arson violates his due process rights by denying him the opportunity to prove that he did not possess the required mental state.'"

[5] The jury here was instructed with a modified version of CALCRIM 625 as follows: "[y]ou may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill. You may not consider that evidence in deciding

instruction advises that voluntary intoxication cannot be considered to negate implied malice. Additionally, the jury was further instructed regarding the principles of murder pursuant to CALCRIM No. 520 that defendant was guilty of murder if he acted with express malice (intent to kill) or implied malice (a conscious disregard for human life), and was further instructed on voluntary manslaughter based on heat of passion and imperfect self defense theories, as well as involuntary manslaughter.

Defendant Suffered no Prejudice as a result of the Court's Instruction to the Jury

We further conclude that defendant's claim is unavailing for another reason. Defendant was not prejudiced by the court's instruction because he did not rely primarily on the defense of intoxication, as the evidence he introduced so indicates.

As noted above, little evidence was presented by defendant that he was intoxicated when he stabbed Jones. And, as the arguments to the jury so demonstrate, the prosecution's theory of the case was that defendant committed a second-degree murder, while the defense theory consisted of a combination of potential defenses, i.e., self-defense, defense of others, accident, or essentially, that defendant acted in the heat of passion, or in imperfect self-defense.

Thus, we conclude that the application of section 22 and the court's instructing the jury with CALCRIM No. 625 which mirrors this Penal Code section did not violate defendant's constitutional rights.

III

Disposition

The judgment is affirmed.

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whether the defendant acted with implied malice. The fact that a defendant was voluntarily intoxicated is not a defense and does not relieve responsibility for the crime of implied malice murder. [¶] A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect. [¶]You may not consider voluntary intoxication for any other purpose. Trial counsel proffered no objection to the modified instruction.